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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JR ENTERPRISES, LP, Plaintiff and Appellant, v. CITY OF RANCHO CUCAMONGA, Defendant and Respondent.	E045235 (Super.Ct.No. RCV090728) OPINION

APPEAL from the Superior Court of San Bernardino County. Martin A. Hildreth, Judge. Affirmed.

Pillsbury Winthrop Shaw Pittman, Scott A. Sommer, John M. Grenfell and Mark E. Elliott for Plaintiff and Appellant.

Richards, Watson & Gershon and Saskia T. Asamura for Defendant and Respondent.

Plaintiff JR Enterprises, LP appeals after summary judgment was granted in favor of Defendant City of Rancho Cucamonga (the City) in plaintiff's action for damages for

inverse condemnation, taking and damaging of property, nuisance and dangerous condition of public property. We affirm.

I. PROCEDURAL BACKGROUND AND FACTS

Plaintiff operates a mobilehome park in the City known as Pines Country Estates (the Pines). The Pines is located on the west parcel of a two-parcel property at the corner of Foothill Boulevard and Hermosa (formerly Turner) Avenue. The east parcel remains undeveloped. The property is located within a formerly unincorporated area of San Bernardino County (the County), which became part of the City when the City was incorporated on November 30, 1977.

In July 1969, when the Pines was in its development stage, the County and San Bernardino County Flood Control District (District) had jurisdiction over the property. The County and the District required plaintiff to mitigate the known flooding hazard on the property as a condition of building the Pines. It was noted that "[t]wo well defined watercourses traverse the site in a southerly direction conveying accumulated local drainage flows from the north. . . . [¶] . . . the site is subject to infrequent flood hazards by reason of overflow." Initially, the County was going to require dedication of a drainage easement; however, in November 1969, shortly before the project was presented to the County planning commission, the easement requirement was dropped.[1] The County's road department explained that it "will not require flowage easements or San

[1] Richard Olson, a County employee since 1970, testified that in his experience, this could occur "when for some reason the owner/developer of the property requests that they maintain the system."

Bernardino County Drainage Easements through the trailer park area, as the maintenance of these drainage facilities will be the responsibility of the property owner." The property owner was required to submit plans "by a Registered Civil Engineer." The road department's letter served as a reminder to the engineer that in designing the drainage structure necessary for the proposed project, there was a design on file showing the drainage structure that flows underneath Foothill Boulevard.

The Pines project was approved on December 4, 1969. The final approval notes: "The offsite drainage . . . must be carried in an improved concrete box or pipe section as per State Highway Department requirements. (The 'Q' should be obtained from the Flood Control District.)" While the final conditions of approval (December 4, 1969) failed to reflect the maintenance obligation, the record shows that during the months prior to final approval, both the property owner and the project engineer were part of the discussions and thus were made aware of the property owner's responsibility of maintaining the drainage facilities.

On March 3, 1970, the District received a letter from Thomsen Engineering, Inc. dated February 12, 1970, entitled "Specifications for Installation of Corrugated Pipe." On September 14, 1970, the chief zoning inspector of the building and safety department sent a memorandum to Tony Mormann of the County road department seeking the status of the following condition of site approval: "The off-site drainage which enters this trailer park area and flows underneath Foothill Blvd. must be carried in an improved concrete box or pipe section as per State Highway Department requirements. (The 'Q'

should be obtained from the Flood Control District.)" The next day, the chief zoning inspector sent a memorandum to the District inquiring as to the status of condition No. 17 that "[a]dequate facilities shall be provided to intercept drainage flows at the northerly boundary and conduct them through and/or around the site." On September 30, the District advised that condition No. 17 had been "met to the satisfaction of this office."

Sometime between 1970 and 1973, the developer installed a large Y-shaped corrugated aluminum storm drain beneath the property (Y-pipeline), which connected to two culverts beneath Foothill Boulevard. The easterly portion of the Y-pipeline was placed within the existing historic swale created by natural surface flow. Instead of routing the drainage around the property, the developer aligned the Y-pipeline using the shortest distance possible from north to south, which meant that the pipeline was under mobilehome pads with habitable structures sitting on top of the drain. Olson, an employee of the District and a County employee since 1970, stated the Pines "was designed and constructed by the private engineers and contractors retained by the Developer. The drainage facilities built for the Project were not designed or constructed by any County or District personnel, or by any engineers or contractors retained by either entity." There is no record indicating the County or the District approved the construction plans of the Y-pipeline. There is nothing in the record evidencing a dedication of easement of the Y-pipeline to the County or the City.

While the grading plans submitted by the developer specified conventional reinforced concrete pipe or corrugated metal, fully asphalt lined, the Y-pipeline was made

of thin corrugated aluminum pipe listed on the grading plans as an "alternate," which had not been approved by Caltrans for storm drain use. The Y-pipeline was 72 inches in diameter at its stem. Because the grading plans included various possible alternatives for the materials for the Y-pipeline (including the corrugated aluminum pipe, which was not approved by Caltrans) the grading plans could not constitute final approved plans or specifications for drainage at the property. The County records contain no plans, specifications, or as-builts for the Y-pipeline reflecting the County's approval of the final design, construction, or the materials used. Instead, a September 1970 County memorandum reflects only that the District notified the County building and safety department that four of the County's 29 conditions, including drainage, were "met to the satisfaction of [the District]." The Y-pipeline fulfilled its function of preventing flooding at the property until October 20, 2004.

Pursuant to the long-term ground leases, the owners transferred maintenance responsibility to plaintiff as the long-term lessee. By signing the lease, plaintiff agreed to be responsible for maintaining the property, including its storm drains, in good operating condition.[2] However, since operating the Pines in 1977, plaintiff never inspected the

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[2] At oral argument, plaintiff contended that its ground lease was not a contract with the County or the City to maintain the Y-pipeline because there is no mention of the Y-pipeline or storm drains in the agreement. We disagree. Paragraph 8 of the lease, in relevant part, provides: "MAINTENANCE OF PREMISES. [¶] . . . Lessee shall, at all times during the full term of this Lease and at its sole cost and expense, keep and maintain the Premises and all improvements thereon in good order and repair and in a clean, sanitary, neat and attractive condition. Lessee shall . . . maintain, and repair all . . . sewers, sewer connections, drains, . . . and other improvements on or adjoining the Premises which may be required at any time by law to be constructed, maintained and

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Y-pipeline, never maintained it, never repaired it, and had no plans to replace it. After several decades, corrosion developed in the bottom of the drain.

After the City incorporated in 1977, there was never any easement offered to or accepted by the City for the Y-pipeline. As plaintiff admitted, the City "did not have the right to enter onto [p]laintiff's property." Prior to October 20, 2004, plaintiff never asked the City to maintain or repair the Y-pipeline, nor did the City do so. However, as Plaintiff noted during oral argument, only 10 percent of the water flowing through the Y-pipeline came from the Pines; the remainder came from developments uphill. Uphill developments that were approved by the City in the 1980's contributed 32 percent of the total flow through the Y-pipeline that was connected to the City's storm water system.

On October 20, 2004, a portion of the Y-pipeline collapsed, immediately creating two sinkholes. The collapse destroyed one mobilehome and significantly damaged another. Plaintiff had to evacuate many of the residents and provide them with temporary housing. On April 19, 2005, plaintiff filed a claim for damages with the City.

On October 13, 2005, plaintiff initiated this action against the City, alleging causes of action for inverse condemnation under state and federal law, nuisance, and dangerous conditions. Plaintiff claimed that it was not responsible for maintaining the Y-pipeline because the County's "Conditions of Approval of the subject property, which required the installation of the [Y-pipeline], did not require or suggest any maintenance of the

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repaired. . . ." The fact that plaintiff either negligently or intentionally overlooked the above section does not exempt it from its requirements.

[Y-pipeline] after installation." The City moved for summary judgment, claiming it had no liability for the privately-constructed pipeline. The trial court agreed with the City, granted the motion for summary judgment, and entered judgment in favor of the City. In its order, the trial court found that plaintiff admitted "the storm drain pipe beneath its trailer park . . . was private, does not lie within any easement and was never dedicated to any public agency. The City had no role in the design or construction of the drain. The City did not own, possess or control [plaintiff's] private drain. The drain was not accepted by the County or the City. [Plaintiff] admitted the City had no authority to enter the park. [Plaintiff's] leases provide that [plaintiff] is responsible for maintenance." Plaintiff appeals.

II. STANDARD OF REVIEW

A trial court properly grants summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) As moving party, the defendant is entitled to summary judgment if he or she establishes a complete defense to the plaintiff's causes of action or shows that one or more elements of each cause of action cannot be established. The defendant must support his or her motion with affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. (Code Civ. Proc., § 437c, subds. (b), (o)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849.)

The moving party defendant bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. Once the defendant has met this burden of production, he or she causes a shift. The burden shifts to the plaintiff to make a prima facie showing that a triable issue of material fact exists. From commencement to conclusion, however, the moving party defendant bears the burden of persuasion that no triable issue of fact exists. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at pp. 850-851.)

"On appeal, we exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.]" (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201.) For the reasons that follow, we independently conclude there are no triable issues of material fact and the City is entitled to judgment as a matter of law.

III. ARE THERE TRIABLE ISSUES OF MATERIAL FACT?

Plaintiff contends the trial court erred in granting summary judgment in favor of the City because (1) the City is subject to inverse condemnation liability for the failure of the Y-pipeline; (2) the fact that the Y-pipeline was privately constructed does not relieve the City of liability; (3) the City's liability does not depend on the formal acceptance of a dedication or the express creation of an easement; and (4) the authorities relied upon by the trial court are not controlling.

A. Is the City Subject to Inverse Condemnation for the Failure of the Y-pipeline?

Article I, section 19 of the California Constitution allows private property to be "'taken or damaged for a public use only when just compensation . . . has first been paid to, or into court for, the owner.'" When governmental activity causes incidental damage to private property, but the government has not reimbursed the property owner, a suit in "'inverse condemnation'" may be brought to recover monetary damages for "'special injury.'" (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 362.) "'To state a cause of action for inverse condemnation, the plaintiff must allege the defendant substantially participated in the planning, approval, construction, or operation of a public project or improvement which proximately caused injury to plaintiff's property. [Citations.]'" (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336-337 (*DiMartino*).)

Citing *Yee v. City of Sausalito* (1983) 141 Cal.App.3d 917, 919 through 923 (*Yee*) (disapproved on other grounds in *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 443-444, 477-451 (*Bunch*)); *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 692 through 698 (*McMahan's*) (also disapproved by *Bunch*); *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 615 (*Pacific Bell*); and *Marin v. City of San Rafael* (1980) 111 Cal.App.3d 591, 595 through 596 (*Marin*), plaintiff contends that "government entities have a well-established duty to private property owners harmed by the failure of their storm drain infrastructure."

In *Yee*, the storm drainage system that diverted surface waters across the plaintiff's property ruptured. (*Yee, supra,* 141 Cal.App.3d at p. 919.) The ruptured gutter allowed surface water to seep into the soil adjacent to the plaintiff's property, causing massive soil subsidence. (*Ibid*.) The plaintiff brought an inverse condemnation action. The trial court granted summary judgment in favor of the city and the appellate court reversed. (*Ibid*.) The appellate court held that the plaintiff had stated a valid cause of action where property damages resulted from the failure of a public improvement to operate as originally intended. (*Ibid*.) As the City points out, in *Yee*, it was undisputed that the ruptured drain was a public improvement, not a private drain on the plaintiff's property. (*Ibid*.)

In *McMahan's*, the plaintiff operated a furniture store. A water main under the plaintiff's building ruptured resulting in damage to the store. (*McMahan's*, *supra*, 146 Cal.App.3d at p. 687.) The plaintiff sued the city for inverse condemnation. (*Ibid*.) The trial court found in favor of the plaintiff, and the appellate court affirmed. (*Ibid*.) On appeal, the court held that the city "was taking a calculated risk by adopting a plan of pipe replacement and maintenance that it knew was inadequate. The [c]ity's plan of replacement of the water mains reflected the deferred risks of the project both foreseeable and unforeseeable, and it is proper to require the [c]ity to bear the loss when the damage occurs." (*Id*. at pp. 697-698.)

Both *Yee* and *McMahan's* are of questionable value, since our Supreme Court has suggested that both cases seem to have relied upon an incorrect "strict liability" standard.

(See *Belair v. Riverside County Flood Control Dist*. (1988) 47 Cal.3d 550, 566-567, and *Bunch, supra*, 15 Cal.4th at pp. 443-444.)

In *Pacific Bell*, a telephone company sued the city for inverse condemnation when a corroded cast-iron water pipe to a fire hydrant burst causing the telephone company's facility to flood. (*Pacific Bell, supra*, 81 Cal.App.4th at p. 598.) The trial court found for the city, and the appellate court reversed, holding that the plaintiff was entitled to recover for inverse condemnation damages since the city's water delivery system as deliberately designed and maintained was a substantial cause of the damage. (*Id*. at pp. 602-606.)

In *Marin*, an underground drainage pipe that diverted surface waters under the plaintiffs' property burst, causing damage to the property. (*Marin, supra*, 111 Cal.App.3d at pp. 593-594.) The plaintiffs sued for inverse condemnation and lost. (*Id*. at pp. 594-595.) The appellate court reversed, holding that the "plaintiffs' damages had proximately resulted from the [c]ity's maintenance and use of a public improvement as deliberately planned and designed by the [c]ity." (*Id*. at p. 596.) Further, the city had installed the pipe, knew of the continued use of the pipe for drainage purposes over many years, and it was part of the storm drainage system. (*Ibid*.)

As the City notes, each of the cases relied upon by plaintiff involves public improvements, owned and operated by the public entity defendants. In contrast, this case concerns plaintiff's private drain pipe located under its own property. To the extent that plaintiff argues the City may be liable under a theory of inverse condemnation for damages caused by "the failure of their [(the City's)] storm drain infrastructure," plaintiff

is correct. (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 337-338; *Skoumbas v. City of Orinda* (2008) 165 Cal.App.4th 783, 794 [issues include whether the city's ownership, operation or control of public improvements were unreasonable or posed an unreasonable risk of harm to the plaintiffs, and whether the city's unreasonable conduct was a substantial cause of the damage to the plaintiff's property]; *Ullery v. County of Contra Costa* (1988) 202 Cal.App.3d 562, 568-569 (*Ullery*).) However, this case involves a privately constructed pipeline under private property. For the answer to that question, we turn to plaintiff's next issue.

B. Is the City Liable for Damages Caused by the Failure of a Privately Constructed Pipeline?

Plaintiff notes the trial court "emphasized that the Y-pipeline 'was private, does not lie within any easement and was never dedicated to any public agency.'" However, plaintiff contends that "under California law, inverse condemnation can be found where—as here—a private property owner is required to construct a pipeline which becomes a component of a municipal storm drain system; the municipality uses that pipeline for many decades to discharge public storm waters; and the property owner then suffers damage because the pipeline fails." During oral argument, plaintiff stressed that by running 90 percent of storm water through the Y-pipeline, the City converted the drain into a public system. Plaintiff cites *Marin, supra*, 111 Cal.App.3d 591, and argues that case "has never been called into question insofar as it holds that an inverse condemnation claim may be based on the failure of a privately-constructed work subsequently

'approved' or 'accepted' for public use by a municipality." We find plaintiff's reliance on *Marin* to be misplaced.

In *Marin*, the city had extensively participated in the design and construction of an extension to the drain pipe on the plaintiff's property. The city had installed the pipe on the property and replaced it with a larger one without permission of, or objection by, the property owner. (*Marin*, *supra*, 111 Cal.App.3d 591, 593.) Then the city actively participated in the lot owner's drain pipe extension project. When the lot owner wished to extend the pipe, he was put in contact with the city's surveyor, who "came out and told [the lot owner] 'exactly what pipe to lay and how to do it'; the pipe was then laid in a ditch according to those directions. When the pipe was in place [the city's surveyor] inspected it; according to the lot owner's testimony, he 'came back and I cemented all the joints . . . and he told me to go ahead and fill it, and when I filled it I had the [c]ity street sweeper and the trucks come up and dumped dirt and I had the municipal water district come up and helped me fill it.'" (*Id.* at p. 594.) When the pipe later ruptured, the plaintiff placed a concrete obstruction in the drain to prevent further damage. (*Ibid*.) The city sought an injunction to compel the plaintiff to remove the concrete obstruction to "'restore the *storm drainage system* to a condition that is operational. . . .'" (*Ibid*.) As the *Marin* court noted, "no contention is made, nor could any reasonably be made, that plaintiffs' damages were proximately caused by their own act, or fault, or negligence." (*Id*. at p. 595.)

In contrast to the facts in *Marin*, here, neither the City nor its predecessor in interest—the County—approved, accepted, or took any official action asserting its dominion or control over the Y-pipeline. The record shows that the Y-pipeline was privately constructed. Although it became a part of the public drainage system, that fact alone does not convert it into a public use. (*Ullery*, *supra*, 202 Cal.App.3d at pp. 570-571.) Instead, absent a recorded easement or accepted dedication, liability is imposed on a public entity only when the public entity has exercised dominion and control over the private property.

In *Ullery*, landowners sued the county for inverse condemnation when landslides resulted from erosion of an intermittent natural stream. (*Ullery*, *supra*, 202 Cal.App.3d at p. 566.) The trial court found that the county was not liable for inverse condemnation because it owned no part of a creek bed in a natural watercourse that traversed the plaintiffs' private property. (*Id.* at p. 567.) The county had expressly rejected the developer's offer of dedication of a drainage easement within the natural watercourse and never took any affirmative steps exhibiting dominion and control, such as improving, maintaining, or repairing the creek bed. (*Id*. at pp. 567-570.) The fact that the county approved the subdivision map, standing alone, was insufficient to create liability. (*Id*. at pp. 570-571.) The *Ullery* court specifically noted that the county "did not approve or actively construct a drainage system which diverted waters onto appellants' property." (*Id*. at p. 571.)

In *DiMartino*, *supra*, 80 Cal.App.4th 329, the plaintiffs sued the city in inverse condemnation when they found a deteriorated storm drain pipe under their residence. (*Id.* at p. 332.) Holding the city liable, the trial court awarded damages for the cost of relocating the pipe into an existing drainage easement. (*Id*. at p. 335.) The appellate court reversed after finding no evidence that the city or the county substantially participated in the planning, construction, or maintenance of the drain pipe, exercised dominion or control over the pipeline, or expressly or impliedly accepted dedication of the pipeline. (*Id*. at p. 344.) According to the facts, neither the plaintiffs nor the public entities were aware of the location of the drain pipe until the plaintiff found it while remodeling their home. (*Id*. at p. 333.) The court observed: "The purpose of the pipe appears to have been entirely private: to permit construction of private residences on lots 36 and 37, which otherwise would have been unbuildable due to waters flowing in a natural watercourse." (*Id*. at p. 344.)

The facts in this case are similar to those in *DiMartino*.[3] Here, the Pines is located on property that historically floods due to the overflow from upstream, which naturally

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[3] During oral argument, plaintiff argued that this court's decision fails to follow the decision of our colleagues in the First District in *Skoumbas v. City of Orinda, supra*, 165 Cal.App.4th 783. We find that decision distinguishable. In *Skoumbas*, the property owners sued the city when their property was damaged by erosion caused by surface water discharged from a storm drain. (*Id*. at pp. 787-790.) The *Skoumbas* court reversed summary judgment for the city, concluding that "the critical inquiry is not whether the entire system was a public improvement, but rather whether the [c]ity acted reasonably in its maintenance and control over those portions of the drainage system it does own." (*Id.* at p. 787.) Specifically, the city implemented the improvements to Candlestick Road, the catch basin and the 40-foot pipe, in order to divert storm water. (*Id.* at p. 794.) By virtue of the city's actions, the Skoumbas property was damaged. (*Ibid.*) Here, in contrast,

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flows downhill across the property towards Foothill Boulevard. This is evident by the presence of the natural swale crossing the property and by the County's requirement that the developer install a drainage system as a condition of building the mobilehome park. The developer agreed to install a drainage system, namely the Y-pipeline, which connected to the existing drainage facilities under Foothill Boulevard. As in *DiMartino*, the Y-pipeline was not located within any easement or dedicated to any public entity. There is no record of the County formally accepting maintenance obligations for the Y-pipeline. To the contrary, the County relinquished its right to require an easement, "as the maintenance of these drainage facilities will be the responsibility of the property owner." The County was not responsible for, nor did it play any part in, designing or constructing the Y-pipeline. After the City incorporated, there was no dedication of the Y-pipeline to the City, no easement was given, and there was no agreement or understanding that the City would maintain, improve, or repair the Y-pipeline. Under the facts of this case, the trial court was correct in granting summary judgment in favor of the City.

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there was no public improvement which caused the damage to plaintiff's property. Rather, it is the location of plaintiff's property that makes it susceptible to flooding damage. The purpose of installation of the Y-pipeline was to mitigate the known flooding hazard on the property as a condition to building the Pines.

C. Is the City's Liability Conditioned Upon the Formal Acceptance of a Dedication or the Express Creation of an Easement?

Given the lack of evidence of any formal acceptance of a dedication or the express creation of an easement, plaintiff contends that the County's (and later the City's) approval, acceptance, and use of the Y-pipeline constitutes an implied acceptance of privately constructed property for a public use. In support of this argument, plaintiff notes that (1) the County required the Y-pipeline as a condition of approving the project; (2) the County approved the plans for the Y-pipeline as submitted by the developer; (3) the County inspected and approved the Y-pipeline prior to certifying compliance with the development conditions; and (4) the County (and later the City) used the Y-pipeline as a link in the public storm drain infrastructure for years to discharge storm waters from upgradient developments. For the reasons stated herein, we reject plaintiff's contention.

Again we turn to *DiMartino, supra,* 80 Cal.App.4th 329, where a similar argument was made and rejected. Our colleagues in Division Two of the First District stated: "The key question is whether connection of a private pipe segment to an admittedly public pipe segment converts the former to a public improvement. As the City points out, such a rule would allow circumvention of the Subdivision Map Act: a developer would no longer need to comply with requirements of dedication and acceptance, connection of any pipe on private property to a public roadway cross-culvert would transform the private pipe to a public one. We have found no case recognizing such a doctrine. Indeed, in *Chatman v. Alameda County Flood Control Etc. Dist*.[(1986)] 183 Cal.App.3d 424, an analogous

argument was rejected where the court held that district maintenance of a portion of the creek did not transform the culvert flowing under the plaintiffs' property into a public improvement. [Citation.]" (*DiMartino, supra*, 80 Cal.App.4th at p. 343; see also, *Yox v. City of Whittier* (1986) 182 Cal.App.3d 347, 354-355 [no inverse condemnation liability where neither public use nor public maintenance of the private watercourse was demonstrated by the evidence].) We agree. Plaintiff's private drain on private property does not become a public work merely because public water drains through it or permits are issued for it. Liability is imposed only if the public entity had an easement, accepted an offer of dedication, or exercised dominion and control over the private drain. Because none of these conditions were found under the facts in this case, inverse condemnation liability cannot be imposed on the City.[4]

D. Are the Authorities Relied Upon by the Trial Court Controlling?

In a final argument, plaintiff faults the trial court for relying on *Ullery* and *DiMartino* instead of *Marin*. According to plaintiff, the facts of the cases relied upon by the trial court are distinguishable. Regarding *Ullery, supra*, 202 Cal.App.3d at p. 567, plaintiff notes that the court considered the "natural unimproved watercourse," which provided drainage for a 40-acre watershed; however, in this case, plaintiff is "not

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[4] In its reply brief, plaintiff for the first time discusses the City's National Pollutant Discharge Elimination System permit and the Federal Clean Water Act and argues that the City was required to inspect and maintain the Y-pipeline. Plaintiff forfeited this contention by failing to raise it in its opening brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.) We do not consider matters raised for the first time in the reply brief. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

claiming that a natural stream is a public improvement." Instead, plaintiff points out it was the County that required the developer to construct the Y-pipeline. Also, plaintiff notes the county did not approve or actively construct the drainage system in *Ullery* (*Id.* at p. 571), while the opposite is true here. Regarding *DiMartino,* plaintiff points out there was no evidence that the county (the city's predecessor in interest) constructed, required or supervised the portion of the drain pipe in question. (*DiMartino, supra,* 80 Cal.App.4th at p. 337.) In fact, there was no evidence that either public entity even knew of the pipe's existence. (*Id.* at p. 338.) In contrast to these two cases, plaintiff argues the case of *Marin, supra,* 111 Cal.App.3d 591, is more factually on point. Specifically, plaintiff notes the fact that the pipe in *Marin* was part of the city's storm drainage system. Likewise, in this case, the "City's experts concede that the same is true."

Having already distinguished *Marin,* we need not repeat our discussion. As we have already stated, we find plaintiff's reliance on *Marin* misplaced. We agree with the trial court's reliance on *Ullery* and *DiMartino* for the reasons previously stated in this opinion.

IV. OTHER CAUSES OF ACTION

Assuming we accept plaintiff's contentions noted above, it further argues that the judgment should be reversed as to its other causes of action. Having found no merit to plaintiff's arguments, we necessarily find no merit to this last one.

V. DISPOSITION

The judgment is affirmed. Costs shall be awarded to defendant.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

GAUT
J.